No. 1381

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRE DU LAC ASSOCIATION, INC.,
Cross-Petitioner,

vs.

TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATION, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,
Cross-Respondents.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I. QUESTIONS PRESENTED

1. Is the right to equitable relief from violations of the Interstate Land Sales Act, 15 U.S.C. § 1701 *et seq.*, created by Section 9 of that statute, 15 U.S.C. § 1709, so dependent upon individualized proof as to preclude an association from prosecuting claims for such relief on behalf of its members?

2. Does the injury element of claims for relief from statutory violations, *e.g.* violations of the Interstate Land Sales Act, 15 U.S.C. § 1701 *et seq.*, or the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, preclude use of the doctrine of associational standing to secure equitable relief from such violations?

3. Does a not-for-profit corporation whose members have been injured in their property by reason of a violation of 18 U.S.C. § 1962 have standing, under the doctrine of associational standing, to seek relief from those injuries on behalf of its members pursuant to 18 U.S.C. § 1964?

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H. REP. NO. 96-153, 96th Cong., 1st Sess., *reprinted in* 1979 U.S. Code Cong. & Ad. News 2346 9

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TERRE DU LAC ASSOCIATION, INC.,
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TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATION, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,
Cross-Respondents.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-Petitioner, Terre Du Lac Association, Inc. respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 6, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 772 F.2d 467. The opinion of the District Court is reported at 601 F.Supp. 257.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on September 6, 1985. A petition for rehearing and

rehearing en banc was denied on October 14, 1985. Cross-respondents, Terre Du Lac, Inc., Terre Du Lac Golf & Country Club, Inc., Terre Du Lac Country Club Association, C.I.T. Corporation, Sensibar Enterprises, Inc., Mo-Ill, Ltd., and James O. Kwon, subsequently filed with this Court a Petition for a Writ of Certiorari which was docketed as No. 85-1169. That petition was received by cross-petitioner Terre Du Lac Association, Inc. on January 9, 1986. This cross-petition is being filed within thirty days of the receipt of the petition in Docket No. 85-1169, pursuant to Rule 19.5 of the Rules of the Supreme Court of the United States. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. §§ 1701-1720

18 U.S.C. § 1341

18 U.S.C. §§ 1961-1964

STATEMENT OF THE CASE

This case arises out of the promotion and operation of a private recreational lake-type real estate development. The development, known as Terre Du Lac, occupies over five thousand acres of land in southeastern Missouri.

The development was begun by the Respondent Terre Du Lac, Inc. ("TDL, Inc."). Over the course of time, TDL, Inc. was joined in its venture by the other Respondents (collectively, the "Developers"), each of whom now have a role or stake in the continuing promotion and/or development of Terre Du Lac.

The Developers have marketed lots in Terre Du Lac using the means and instrumentalities of interstate commerce at prices ranging from five thousand to thirty-five thousand dollars. Approximately four thousand lots in Terre Du Lac have been sold by the Developers.

Petitioner, Terre Du Lac Association, Inc. (the "Association") is a Missouri not-for-profit corporation. The Developers organized the Association to own, operate, manage and maintain the roads, facilities, amenities and common grounds within Terre Du Lac. Under the terms of its corporate charter and by-laws, the Association is obliged to operate, manage and maintain the facilities and common areas of the development once they have been conveyed to it by TDL, Inc., and to maintain the roads in the development upon "permanent surfacing" thereof.

Pursuant to restrictive covenants in the deeds for land in Terre Du Lac, each lot owner in the development is required to be a member of the Association. As such, lot owners are obligated to pay assessments levied by the Association. The Association's principal source of funds is the assessments it levies on its members. The Association uses these assessments to furnish police and fire protection in the development, and to maintain and operate the roads and other common properties, facilities and amenities that it owns in the development.

In order to promote the sale of lots in the development, the Developers of Terre Du Lac made various promises and representations to prospective purchasers of lots in the development. Among the representations and promises made were statements: (1) that the Developers would pave the roads in the development with asphalt over a stabilized base; (2) that the Developers would complete the construction of water and sewer systems in the development, and (3) that upon completion of the amenities located in the development, (lakes, a country club, golf courses, picnic areas) the amenities would be transferred, free and clear of encumbrances, to the Association. Many, though not all, of these representations were contained in written property reports that were filed with the U.S. Department of Housing and Urban Development and furnished to purchasers of lots in Terre Du Lac pursuant to the Interstate Land Sales Act, 15 U.S.C. § 1701 *et seq.* ("ILSA") or in written adver-

tisements published by the Developers. Based on these and other similar representations, approximately three thousand four hundred members of the Association purchased lots in the development.[1]

By 1983, it had become clear that the Developers had no intent to fulfill these promises. The Association, therefore, commenced suit against the Developers in the United States District Court for the Eastern District of Missouri to attempt to force the Developers to complete the development in accordance with their promises and representations.

The Association's First Amended Complaint (the "Complaint") alleges that the Developers violated various provisions of the Interstate Land Sales Act, 15 U.S.C. § 1701 *et seq.*, the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1961 *et seq.* ("RICO"), the Sherman Act, 15 U.S.C. § 1 *et seq.*, and committed various common law torts and breaches of contract.

The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331, 15 U.S.C. §§ 26, 1701 *et seq.*, 18 U.S.C. §§ 1964, 1965, and principles of pendent jurisdiction.

The claims asserted in the Complaint fall into two categories. The first category consists of claims held by the Association in its own right against the Developers. These claims arise out of the Developers' violations of RICO and the Sherman Act. The second category consists of claims held by the Association's members against the Developers. The claims in the second category arise out of the Developers' violations of ILSA, RICO, the Sherman Act and at common law. Each claim seeks

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[1] The other members of the Association, approximately six hundred, did not purchase their lots directly from the Developers. These members purchased their lots from other persons, whose title to the property is in most instances traceable to the Developers.

equitable relief, primarily in the nature of specific performance of the Developers' promises and representations.

The various statutory violations alleged in the Complaint all have their origins in the Developers' promises and representations detailed above. Those representations and promises are alleged to be part of a scheme to defraud potential Terre Du Lac purchasers in violation of Section 3 of ILSA, 15 U.S.C. § 1703. The Complaint also alleges that the Developers repeatedly violated the federal mail fraud statute, 18 U.S.C. § 1341, by using the mails in furtherance of their fraudulent scheme based on these false representations and promises, and that their numerous acts of mail fraud in connection with the sale of lots in Terre Du Lac form a pattern of racketeering activity actionable under RICO, 18 U.S.C. § 1961 *et seq.* Thus, the basic facts underlying both the ILSA claims and the RICO claims, i.e., the Developers' repeated promises concerning major subdivision improvements and amenities and their failure to fulfill such promises, are identical.

The Association is the only named plaintiff in the suit. It seeks to pursue its members' claims against the Developers for equitable relief based on the doctrine of associational standing.

The Developers moved to dismiss the Complaint for failure to state a claim upon which relief could be granted. The Developers contended, among other things, that the Association lacked standing to pursue its members' claims arising from the Developers' statutory violations. The District Court agreed with this contention (as well as others not involved in this cross-petition) and dismissed the Complaint in its entirety.

The Association appealed from the Order of dismissal to the United States Court of Appeals for the Eighth Circuit, invoking its jurisdiction pursuant to 28 U.S.C. § 1291. On appeal, the Court of Appeals reversed the dismissal of the Association's RICO claims, but affirmed the dismissal of the ILSA claims

asserted by the Association on behalf of its members.[2] It stated, as a basis for affirming the dismissal, that the equitable relief sought by the Association cannot be granted in the absence of individualized proof of the claims asserted. On this premise, the Court concluded that the Association lacked standing to pursue ILSA claims on behalf of its members.

In reaching this conclusion, the Court improperly applied the rules relating to the doctrine of associational standing, as set forth in this Court's decisions in *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333 (1977) and *Warth v. Seldin,* 422 U.S. 490 (1975).

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[2] The Court of Appeals' opinion specifically addressed the issue of associational standing only as to the ILSA claims. The Court of Appeals erroneously stated that the Association did not contest on appeal the district court's finding that the Association lacked standing to pursue its members' RICO claims.

REASONS FOR GRANTING THE CROSS-PETITION

I. The Issue Of Associational Standing Must Be Resolved If The Court Grants The Developers' Petition For A Writ Of Certiorari

In *Terre Du Lac, Inc., et al. v. Terre Du Lac Association, Inc.*, Docket No. 85-1169, the Developers have asked this Court to decide

> [w]hether a corporation has standing to assert a fraud-based claim under the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO), 18 U.S.C. § 1961 et seq., when no defendant is alleged to have made any misrepresentations to the corporation, and the corporation took no action in reliance on such alleged misrepresentations.

This question cannot be answered fully in the context of this case without determining whether the Association has standing to prosecute its members' claims against the Developers based on the principles of associational standing set out in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977) and *Warth v. Seldin*, 422 U.S. 490 (1975).

In both the District Court and the Court of Appeals, the Association asserted that it had standing to pursue two separate categories of RICO claims. In the first category are claims which the Association has based on injuries it sustained by reason of the Developers' RICO violations. In the second category are claims for injuries sustained by the Association's members by reason of the Developers' RICO violations. It is this second catgegory of claims that presents the issue of associational standing.

The analysis of the Association's standing to pursue claims on behalf of its members based on principles of associational standing is the same whether the claim under consideration arises under RICO or ILSA. *See Terre Du Lac Association, Inc. v.*

Terre Du Lac, Inc., 601 F.Supp. 257, 261 (E.D. Mo. 1984) (*infra*, at A-22) (holding that a resolution of the associational standing issue as to ILSA claims dictates the same resolution of that issue as to RICO claims). Both types of claims arise out of a common nucleus of operative facts. Both seek to remedy the same injuries in the same fashion. The Association's relationship to its members is the same with respect to both types of claims. Consequently, if the Court grants the Developers' Petition, and, on review of the Court of Appeals' decision agrees that the Association has standing to assert RICO claims on behalf of its members, it follows that the Association also has standing to assert the ILSA claims alleged in the Complaint on behalf of its members.

It would be anomalous for this Court, on review of the Court of Appeals' decision, to hold that the Association has standing to pursue the RICO claims asserted on behalf of its members, but leave standing the lower courts' contrary rulings as to the ILSA claims. Consequently, if the Court grants the Developers' Petition, it should not limit its examination of the associational standing issue to standing under RICO, but should concurrently consider whether the Association has standing to assert ILSA claims on behalf of its members.

II. The Decision Below Raises Significant Questions Concerning The Continued Availability Of Specific Performance And Other Equitable Relief Under The Interstate Land Sales Act, 15 U.S.C. §1701 et seq.

Both the text and legislative history of ILSA make clear that the statute's purpose is to deter or prohibit the sale of land in interstate commerce through misrepresentations or omissions of material fact. *See* 15 U.S.C. §1703; CONF. REP. NO. 1785, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 3053, 3066. As originally enacted, however, ILSA failed to provide an adequate remedy for false promises by land

developers concerning important or attractive subdivision improvements and amenities which were supposed to be provided at some later date. H. REP. NO. 96-153, 96th Cong., 1st Sess. 30, *reprinted in* 1979 U.S. CODE CONG. & AD NEWS 2346, 2346. To address this precise problem, Congress amended ILSA in 1979 to permit federal courts to issue orders of specific performance in ILSA civil actions:

> "In addition, purchasers would have the right to obtain specific performance whenever the court deemed this form of relief to be appropriate, for instance, *in cases where the developer failed to furnish promised improvements*".

Id. at 38-39, 1979 U.S. CODE CONG. & AD. NEWS at 2354 (emphasis added); *see* 15 U.S.C. § 1709(a).

In accordance with Congress' expressed intent, the Association brought the present action for specific performance of the Developers' repeated past promises to complete or furnish a number of extremely important subdivision improvements, including the roads, the water and sewer systems, and the golf courses and clubhouse. The court below, however, dismissed the Association's ILSA causes of action for lack of standing, holding that the instant action could only be prosecuted by each individual Association member. The Association respectfully submits that the Court of Appeals' decision on the standing issue is squarely at odds with the legislative purpose underlying the specific performance remedy of ILSA and would, as a practical matter, sharply reduce if not completely eliminate the availability of such equitable relief in ILSA cases.

The practical consequence of the opinion below is that each of the 3,400 Association members aggrieved by the Developers' unfulfilled promises must bring separate lawsuits for specific

performance.[3] The specific performance sought in this case, however, pertains to major improvements and amenities applicable to the entire subdivision (and not just individual lots), and would, if granted, require the Developers to expend literally millions of dollars. Since specific performance is an equitable remedy, it is exceedingly unlikely that the sweeping specific performance decree desired and deserved by the Association's members could or would ever be granted in a single lawsuit brought by any one individual purchaser. *See, e.g., 3615 Corp. v. New York Life Ins. Co.*, 717 F.2d 1236, 1238 (8th Cir. 1983) (specific performance will not be decreed where it would work a disproportionate hardship on defendants).

Thus, the Court of Appeals' decision on the standing issue means that the Developers can completely ignore their many past promises to furnish or complete major subdivision improvements, secure in the knowledge that their liability in any future (and hypothetical) ILSA actions brought by individual purchasers will be limited to the comparatively small reduction in market value which can be proven by each individual plaintiff. In short, the decision below directly conflicts with the broad remedial purposes of ILSA —and particularly the 1979 specific performance amendment thereto—and actually encourages unscrupulous developers to renege on prior representations concerning major improvements and amenities to be furnished to the entire subdivision.

In addition, the Court of Appeals' ruling overlooks the fact that the financial and legal burden on any single Association member is likely to be so great and so disproportionate to the *individual* potential for recovery that very few, if any, ILSA claims will actually be prosecuted by individual purchasers. *See*

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[3] Prosecution of the claims as a class action suit pursuant to Rule 23, Fed.R.Civ.P., is not a practicable alternative. The Court of Appeals' determination that individualized proof of each member's claims is required effectively precludes class certification.

Siller v. Hartz Mountain Associates, 461 A.2d 568, 573 (N.J.), *cert. denied,* 464 U.S. 961 (1983). Moreover, even in the unlikely event that such claims are filed, the Court of Appeals' refusal to permit the Association to prosecute them all in a single proceeding fosters an unnecessary multiplicity of suits, fails to serve the Congressional objective of forcing developers to live up to their promises, and raises the distinct possibility of inconsistent adjudications.

Conversely, the Association is the authorized representative of its members in connection with their ownership of Terre Du Lac lots and, as this Court has recognized in connection with a very similar plaintiff organization, "provides the means by which they express their collective views and protect their collective interests". *Hunt v. Washington State Apply Advertising Comm'n.,* 432 U.S. 333, 345 (1977). As such, the Association is the perfect vehicle to prosecute its members' long-standing disputes with the Developers and fulfill Congress' purpose in adding a specific performance remedy to ILSA.

III. The Decision Below Conflicts With This Court's Associational Standing Decisions

This Court first articulated the basic elements of associational standing in the seminal decision of *Warth v. Seldin:*

> "Even in the absence of injury to itself, an association may have standing solely as the representative of its members.*** So long as...the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the case, the association may be an appropriate representative of its members ...."

422 U.S. at 511. The requirements for associational standing were further delineated by this Court in *Hunt v. Washington State Apple Advertising Comm'n:*

> "...[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit."

432 U.S. at 343.

In this case, it is undisputed that the Association satisfies the first two requirements of the *Hunt* three-part test. The Court of Appeals, however, concluded that the Association could not satisfy the third *Hunt* requirement "due to the fact that the type of relief available under the Land Sales Act...requires individualized proof of the claims asserted". *Terre Du Lac Ass'n., Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467, 471 (8th Cir. 1985); Appendix A, at A-6. More specifically, the Court of Appeals held that the Association's ILSA claims would require "substantial evidence" of individual members' injuries in order "to determine whether specific performance, as opposed to a damages remedy, would be 'fair, just, and equitable.' " *Id.*[4]

The Court of Appeals' ruling on the standing issue seriously misreads and erroneously limits this Court's associational standing decisions. In *Warth v. Seldin,* this Court clearly recognized that associational standing is appropriate unless the nature of the claim asserted or the relief requested makes individual participation by "*each* injured party *indispensable* to proper resolution of the cause...." 422 U.S. at 511 (emphasis added). In the present case, most of the false representations sued upon are in written form (e.g., HUD Property Reports, written adver-

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[4] The Court of Appeals' conclusion on this point is directly contrary to that of the District Court, which held that "plaintiff's associational requests for relief do *not* require such [individual] participation." *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 601 F.Supp. 257, 260 (E.D.Mo. 1984); Appendix B, at A-20 (emphasis added).

tisements, and the like), and thus very little evidence or testimony concerning the Association's substantive claims will be required from individual Association members. Similarly, since these false representations were so widely disseminated to so many prospective purchasers, very little individualized proof will be needed to establish the Association's right to the broad equitable relief it has requested. Although some Association members will undoubtedly testify in support of the Association's claims, it is clear that participation by *each* individual member is not indispensable or even desirable. Under *Warth v. Seldin*, therefore, associational standing is perfectly appropriate in this case.

This conclusion is strongly reinforced by this Court's decision in *Hunt*, wherein a state organization of apple growers and dealers was permitted to file suit, on behalf of its members, to enjoin enforcement of an assertedly unconstitutional state statute. Significantly, the Court's decision in *Hunt* upheld associational standing notwithstanding the fact that the basis for the injunction was the harm or threatened harm *suffered by a few individual members of the organization:*

> "Here the record demonstrates that the growers and dealers have suffered and will continue to suffer losses of various types. For example, there is evidence...that *individual growers and shippers* lost accounts in North Carolina as a direct result of the statute.***There is also evidence...that *individual growers and dealers* incurred substantial costs in complying with the statute."

Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. at 347 (emphasis added). In this case, just as in *Hunt*, limited participation by *some* Association members may be required to establish the Association's right to relief. The decision in *Hunt* makes it clear, however, that such limited individual participation provides no basis for denying the Association the right to sue in a representative capacity.

In fact, the Court of Appeals' contrary holding would emasculate the concept of associational standing as recognized and approved by this Court. There are very few, if any, associational standing cases where at least limited participation by the plaintiff organization's members would not be necessary to establish a right to relief. This consequence provides sufficient reason to warrant review of the Court of Appeals' decision.

The Court of Appeals also overlooked the significance of the Association's request for purely prospective equitable relief.[5] As this Court has recognized,

> "...[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured".

Warth v. Seldin, 422 U.S. at 515; *see also Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. at 343 (prospective equitable relief is "the type of relief that an association [can] properly pursue on behalf of its members").

An organization's request for prospective equitable relief is vitally important in evaluating the propriety of associational standing. The very purpose of the third *Hunt* requirement is to "assure the court that allowing the parties to proceed in a representational capacity will not harm the individual interests allegedly protected by the representative." *MPIRG v. Selective Service System*, 557 F.Supp. 925, 931 (D. Minn. 1983), *vacated* 747 F.2d 1204 (8th Cir. 1984).

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[5] The Association also requested money damages, but only as an alternative and considerably less desired remedy, and even then only in an amount sufficient to permit the Association itself to furnish and complete the improvements which the Developers were supposed to provide.

In this case, the decree of specific performance sought by the Association will indisputably benefit all its members equally and in the same fashion—the subdivision's roads and water and sewer systems will be completed at the Developers' expense, and certain important subdivision amenities (the golf courses and the clubhouse) will be conveyed to the Association for the benefit of its members free of charge. The Association's request for specific performance thus eliminates the possibility of any conflict of interest between or among its members with respect to the prosecution and outcome of the present action.

Since the whole purpose of the third *Hunt* requirement is to avoid such a conflict of interest, the court below misapplied this Court's decisions in concluding that associational standing is inappropriate.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 84-2296

Terre Du Lac Association, Inc.,
a not-for-profit corporation,
Appellant,

v.

Terre Du Lac, Inc., Terre Du Lac Utilities Corp.,
Terre Du Lac Golf and Country Club, Inc., Terre
Du Lac Country Club Association, a limited partnership, CIT Corporation, Sensibar Enterprises, Inc.,
Moill, Ltd. and James O. Kwon,
Appellees.

Submitted April 12, 1985.

Decided Sept. 9, 1985.

Kenton E. Knickmeyer, St. Louis, Mo., for appellant.

John W. Reid, Fredericktown, Mo., and Mark Arnold, St. Louis, Mo., for appellee.

Before ROSS and JOHN R. GIBSON, Circuit Judges, and COLLINSON,* District Judge.

ROSS, Circuit Judge.

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* The HONORABLE WILLIAM R. COLLINSON, Senior Judge, United States District Court for the Eastern District of Missouri, sitting by designation.

This case involves an action filed by Terre Du Lac Association, Inc. (Association), a property owners' association, against Terre Du Lac, Inc. and other alleged developers of the Terre Du Lac Subdivision. The Terre Du Lac Subdivision is a private recreational land development area located in southeastern Missouri.

The Association's complaint included sixteen counts. Counts one through six were based on the Interstate Land Sales Full Disclosure Act (Land Sales Act), 15 U.S.C. §§ 1701-1720; counts seven through fourteen were based on pendent state law claims; count fifteen was based on the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968; and count sixteen was based on the Sherman Antitrust Act, 15 U.S.C. §§ 1-7. Prior to trial, the defendants filed motions to dismiss all counts of the complaint. The district court granted the motions and the Association now appeals. We affirm the dismissal of the Land Sales Act counts, reverse the dismissal of the RICO and antitrust counts, and vacate the dismissal of the pendent state law counts.

DISCUSSION

1. Land Sales Act — Associational Standing

Counts one through six of the Association's complaint alleged that the defendants violated the Land Sales Act by failing to fulfill the following promises and representations: 1) that the roads in the development would be paved with asphalt, 2) that the sewage disposal and water systems would be completed, 3) that all members of the Association could use certain amenities in the subdivision for free (e.g., golf courses and club house), and 4) that these amenities would be conveyed to the Association upon completion. In particular, count one alleged a violation of 15 U.S.C. § 1703(a)(2)(A), count two alleged a violation of 15 U.S.C. § 1703(a)(2)(B),[1] count three alleged a violation of

[1] Count two actually cited 15 U.S.C. § 1703(a)(2)(D) as the statutory subsection which was violated by defendants' conduct. It is clear

15 U.S.C. § 1703(a)(1)(C),[2] count four alleged a violation of 15 U.S.C. § 1703(a)(2)(C), count five alleged a violation of 15 U.S.C. § 1703(a)(2)(D), and count six alleged that defendant CIT Corporation aided and abetted the other developers in each of these violations. These statutory sections provide that:

> (a) it shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—
>
> (1) with respect to the sale or lease of any lot not exempt under section 1702 of this title—
>
> * * * * * *
>
> (C) to sell or lease any lot where any part of the statement of record or the property report contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein pursuant to sections 1704 through 1707 of this title or any regulations thereunder; or
>
> * * * * * *
>
> (2) with respect to the sale or lease, or offer to sell or lease, any lot not exempt under section 1702(a) of this title—

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from the factual allegations in count two, however, that the Association intended to cite 15 U.S.C. § 1703(a)(2)(*B*), so we shall treat the complaint as though it cited section 1703(a)(2)(B). *See* FED.R.CIV.P. 8(f) ("pleadings shall be construed as to do substantial justice").

[2] Count three actually cited 15 U.S.C. § 1703(a)(2)(C) as the statutory subsection which was violated by defendants' conduct. It is clear from the factual allegations in count three, however, that the Association intended to cite 15 U.S.C. § 1703(a)(1)(C), so we shall treat the complaint as though it cited section 1703(a)(1)(C). *See* FED.R.CIV.P. 8(f); *supra* note 1.

> (A) to employ any device, scheme, or artifice to defraud;
>
> (B) to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision;
>
> (C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser; or
>
> (D) to represent that roads, sewers, water, gas, or electric service, or recreational amenities will be provided or completed by the developer without stipulating in the contract of sale or lease that such services or amenities will be provided or completed.

15 U.S.C. §§ 1703(a)(1)(C), (2)(A)-(D). As relief for the defendants' violation of these provisions, the Association sought specific performance of the unfulfilled representations, plus other appropriate relief. The Land Sales Act provision authorizing such relief provides as follows:

> (a) A purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale or lease was made in violation of section 1703(a) of this title. *In a suit authorized by this subsection, the court may order damages, specific performance, or such other relief as the court deems fair, just, and equitable.* In determining such relief the court may take into account, but not be limited to, the following factors: the contract price of the lot or leasehold; the amount the purchaser or lessee actually paid; the cost of any improvements to the lot; the fair

> market value of the lot or leasehold at the time relief is determined; and the fair market value of the lot or leasehold at the time such lot was purchased or leased.

15 U.S.C. § 1709(a) (emphasis added). *See also* 15 U.S.C. § 1709(c) (authorizes recovery for interest, court costs, attorneys' fees, appraisers' fees, and travel expenses).

The district court dismissed the Land Sales Act counts on the basis that the Association lacked standing. Initially, the court determined that the Association lacked standing to sue on its *own behalf* since the Association did not allege that the Terre Du Lac Subdivision lots which it owns were purchased from the defendants. The Association does not contest this finding on appeal.

The Association does, however, contest the district court's finding that it lacked associational standing to sue *on behalf of its members* as to the Land Sales Act counts. According to the Association's complaint, every owner of a lot in the Terre Du Lac Subdivision is required to become a member of the Association and, at the time the complaint was filed in this case, there were approximately 4,000 lot owners. Approximately 3,400 of these lot owners are alleged to have purchased their lots from the defendant developers from between sometime before 1969 to the date the complaint was filed. The Association seeks to assert the Land Sales Act claims on behalf of these 3,400 members.

The Supreme Court has

> recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). Each of these three requirements for associational standing must be met. *Associated General Contractors v. Otter Tail Power Co.,* 611 F.2d 684, 690 (8th Cir. 1979).

In this case, the district court found that the Association "fail[ed] to satisfy the third requirement that 'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' " *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.,* 601 F.Supp. 257, 259 (E.D.Mo. 1984) (*quoting Hunt v. Washington Apple Advertising Commission, supra,* 432 U.S. at 343, 97 S.Ct. at 2441). The court based this conclusion on the facts that: 1) some of the Land Sales Act counts required proof of reliance, which proof would necessitate testimony by individual members and, 2) there was "potential conflict" amongst the members relating to the suit necessitating individual representation of their interests. *Id.* at 259-61.

We agree with the district court's holding that the Association lacks associational standing to assert the Land Sales Act counts, but do not adopt the district court's reasoning. In our view, the Association lacks associational standing due to the fact that the type of relief available under the Land Sales Act, 15 U.S.C. § 1709(a), requires individualized proof of the claims asserted.

Section 1709(a) provides authority for both damages and specific performance remedies. A damages remedy for a Land Sales Act violation would clearly require individualized proof necessitating the individual participation of the Association members. *See Associated General Contractors v. Otter Tail Power Co., supra,* 611 F.2d at 689-90 (associational standing is traditionally denied in section 4 antitrust actions, which seek treble *damages* awards, due to the need for "precise knowledge of the * * * injury to each plaintiff", whereas in section 16 antitrust actions, which seek *injunctive* relief, associational stan-

ding is not denied unless the association is an inappropriate representative for some reason). First, in order to establish a right to relief, the Association would have to submit evidence relating to each purchase of a subdivision lot in order to establish that the purchaser had a viable Land Sales Act claim. Second, in order to establish the amount of relief due, the Association would have to submit evidence relating to the cost and current value of each lot, as well as evidence relating to the amount by which the defendant's Land Sales Act violations diminished this value. Clearly, the need for such individualized proof renders the Association an inappropriate vehicle to bring the Land Sales Act claims of its members.

The Association seeks to avoid the fact that the damage relief available under section 1709(a) cuts against granting associational standing by arguing that specific performance, not damages, is the relief the Association really wants. A right to a specific performance remedy could be established, the Association argues, by mere proof that the defendants made the alleged promises and representations in violation of the Land Sales Act to one or more of its members. Further, the Association argues, no member would have to testify in court since much of the necessary proof could be established with written evidence such as property reports and written advertisements.

We reject the Association's arguments. In order to determine whether a specific performance remedy is appropriate, the court would have to receive substantial evidence relating to the individual claims and damages of memebers of the Association in order for it to determine whether specific performance, as opposed to a damages remedy, would be "fair, just, and equitable." 15 U.S.C. § 1709(a). Further, the fact that much of the proof could be submitted by written rather than testimonial evidence does not help the Association's cause. The Association's argument boils down to the proposition that the rule against granting associational standing where the "participation of individual members" is required in the lawsuit, *Hunt v.*

Washington Apple Advertising Commission, supra, 432 U.S. at 343, 97 S.Ct. at 2441, refers solely to participation in the form of in-court testimony. Such a narrow reading of *Hunt* is unfounded. Associational standing is properly denied where, as here, the need for "individualized proof", *id.* at 344, 97 S.Ct. at 2442 so pervades the claims asserted that the furtherance of the members' interests requires individual representation.

2. RICO—Conviction Requirement and Standing

Like counts one through six, count fifteen of the Association's complaint sought a remedy for the defendants' failure to fulfill their alleged promises and representations relating to the paving of roads, the completion of the sewage and water systems, and the use and transfer of subdivision amenities. Count fifteen, however, sought relief under the RICO Act. The count alleged violations of sections 1962(a) and (c) of the Act, based on predicate acts of mail fraud, *see* 18 U.S.C. §§ 1341, 1961(1)(B), and sought equitable relief pursuant to section 1964(a) of the Act.

The district court dismissed the RICO count on the basis that "none of these defendants have been convicted of any of the alleged predicate acts of mail fraud." *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc., supra,* 601 F.Supp. at 261. The court relied solely on *Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482 (2d Cir.1984), wherein the court determined that a criminal conviction of a predicate act must precede a private civil suit under RICO.

Subsequent to the district court's decision in this case, the Supreme Court reversed the Second Circuit's decision in *Sedima.* The Supreme Court held that a RICO action may proceed without a criminal conviction of a predicate act. *Sedima, S.P.R.L. v. Imrex Co.,* ____ U.S. ____, ____, 105 S.Ct. 3275, 3281-84, ____ L.Ed.2d ____ (1985).

In view of the Supreme Court's decision in *Sedima,* the failure of the Association's complaint to allege prior mail fraud

convictions of the defendants does not render the complaint deficient. Thus, a reversal of the district court's dismissal of the RICO count is required, unless some other fatal defect in the complaint exists.

The defendants argue that such a defect exists in that the complaint fails to allege sufficient facts supporting the Association's standing to pursue the RICO count. On appeal, the Association does not contest the district court's finding that it lacks associational standing to pursue the RICO count *on behalf of its members*. Instead, the Association argues that it may maintain the RICO action on its *own behalf* because the Association itself was injured by the defendants' acts of mail fraud.

The Association alleged in its complaint that the defendants' acts of mail fraud injured the Association by causing the cost of maintaining the roads in the Terre Du Lac Subdivision, which roads the Association is legally obligated to maintain, to increase. The cost allegedly increased because: 1) the defendants invested the money which they obtained from the mail fraud (i.e., proceeds from the sale of lots in the subdivision) in their own operations rather than using the money to improve (i.e., pave with asphalt) the subdivision roads, and 2) the mail fraud scheme caused more lots to be sold, resulting in more roads and greater usage of the roads which are required to be maintained.

The defendants argue that these allegations of injury are not sufficient to establish the Association's standing since the Association does not allege that it was the target of the alleged mail fraud and since the alleged injury is only indirectly related to the mail fraud. The defendants also argue that the alleged injury is in reality nothing more than injury to the Association's members since the Association will pay for the increased costs of road maintenance by merely allocating a larger share of the members' association dues to cover such costs.

This court has previously held that standing to pursue a RICO action exists even though the plaintiff does not allege that it was

a target of the racketeering activity and even though the plaintiff only alleges that it suffered indirect injury. *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408, 411 nn. 7 & 8 (8th Cir.1984), *vacated and remanded for further consideration in light of Sedima*, ____ U.S. ____, 105 S.Ct. 3551, 87 L.Ed.2d 673 (1985). Our decision in *Alexander Grant* in this respect is consistent with the Supreme Court's decision in *Sedima*, wherein the Court stated:

> *the plaintiff only has standing if,* and can only recover to the extent that, *he has been injured in his business or property by the conduct constituting the violation.* As the Seventh Circuit has stated, "[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (1984), aff'd, ____ U.S. ____, 105 S.Ct. 3291, 87 L.Ed.2d 437.
>
> *But the statute requires no more than this.* Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in § 1962(c), "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

Sedima, S.P.R.L. v. Imrex Co., supra. ____ U.S. at ____, 105 S.Ct. at 3285-86 (emphasis added, footnote omitted).[3] Further,

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[3] On remand from the Supreme Court's vacation of our judgment in *Alexander Grant* we stated: "the approach of the Supreme Court [in *Sedima*] but underscores our conclusion that Grant has standing to

we find no support for the defendants' argument that the Association lacks standing merely because it may pass its alleged injuries on to its members. Thus, we hold that the Association's complaint alleges sufficient injury to support its standing to pursue its RICO action.

3. Antitrust—Tying

Count sixteen of the Association's complaint alleged that the defendants are engaging in unlawful tying in violation of the antitrust laws. This count challenges the defendants' practice of requiring lot owners to pay a $3,000 initiation fee to join the Terre Du Lac Golf and Country Club if they purchased their lot from someone other than the defendants, while offering free memberships to the club to persons who purchase lots from the defendants. The Association sought an injunction against this practice. *See* 15 U.S.C. § 26.

"A tying arrangement is defined as the sale or lease of one item (the tying product) on the condition that the buyer or lessee purchase a second item (the tied product) from the same source." *Rosebrough Monument Co. v. Memorial Park Cemetery Association,* 666 F.2d 1130, 1140 (8th Cir. 1981), *cert. denied,* 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1321 (1982). The Supreme Court recently explained that

> the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have

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assert its claims. *See Sedima,* [____ U.S. at ____ n. 15, 105 S.Ct. at 3286 n. 15,]. We find nothing in our discussion in Point 1 of our earlier opinion, 742 F.2d at 411-12, in conflict with the opinions of the Supreme Court in either *Sedima* or *American National [Bank & Trust Co. of Chicago v. Haroco,* ____ U.S. ____, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985); * * *." *Alexander Grant & Co. v. Tiffany Industries, Inc.,* 770 F.2d 717, 719 (8th Cir.1985) (on remand) (footnote omitted).

> preferred to purchase elsewhere on different terms. When such "*forcing*" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, ____, 104 S.Ct. 1551, 1558, 80 L.Ed.2d 2 (1984) (emphasis added).

Here, the Association argues that the "tying" product is the club memberships, while the "tied' product is the subdivision lots. The Association claims that prospective purchasers will buy lots from the defendants, as opposed to other lot owners, because only the defendants can offer free club memberships.[4] Thus, the Association asserts, the defendants are given an unfair and unlawful competitive advantage in selling lots in the subdivision.

The district court concluded that the Association's complaint "failed to state a claim for which relief could be granted under the antitrust laws" because "[p]urchasers are not *required* to buy golf club memberships in order to buy land in the subdivision, nor are they *required* to buy land from the defendants in order to purchase golf club memberships." *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc., supra*, 601 F.Supp. at 261-62 (emphasis added). The Association argues that the court erred in reaching this decision since purchasers of golf club memberships *are* required, by the economic coercion inherent in the defendants' initiation fee arrangement, to buy a lot from the defendants, even though they "might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hospital District No. 2 v. Hyde, supra*, 466 U.S. at ____, 104 S.Ct. at 1558.

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[4] All lot owners can join the golf and country club, regardless of who the lot was purchased from. But those who do not own a lot in the subdivision cannot join at any price. Thus, in order to join the club, a lot must be purchased from somebody.

In reviewing the district court's decision to dismiss the Association's antitrust action for failure to state a claim, we are governed by the following standards:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.
>
> * * * * * *
>
> *[A] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances,* for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. Nor should a complaint be dismissed that does not state with precision all elements that give rise to a legal basis for recovery. Finally, a complaint should not be dismissed merely because the court doubts that a plaintiff will prevail in the action. That determination is properly made on the basis of proof and not merely on the pleadings.
>
> The question, therefore, is whether in the light most favorable to the plaintiff, the complaint states any valid claim for relief.

Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784, 787 (8th Cir.1979) (emphasis added) (*quoting Jackson Sawmill Co. v. United States,* 580 F.2d 302, 306 (8th Cir.1978), *cert. denied,* 439 U.S. 1070, 99 S.Ct. 839, 59 L.Ed.2d 35 (1979)). After considering the district court's decision in light of these standards, we conclude that the court erred in dismissing the Association's antitrust claim.

The district court's determination that the Association failed to state a cognizable antitrust claim can be explained as being based, in part, on the fact that the factual allegations made by the Association in this case do not mirror the facts underlying

the traditional tying case. In contrast to the traditional tying arrangement, there is no "sale" of the tying product (club memberships) to allegedly coerced buyers here, since the tying product is offered free of charge to such buyers. *See Brown Shoe Co. v. Federal Trade Commission*, 339 F.2d 45, 53, 54 (8th Cir.1964), *rev'd*, 384 U.S. 316, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966). Further, this no cost feature of the tying product is the chief attraction of the tying product which allegedly provides the leverage for sales of the tied product (defendants' subdivision lots). Traditional tying arrangements, in contrast, rely on the desirability or dominant market position of the tying product to coerce sales of the tied product. *See generally Jefferson Parish Hospital District No. 2 v. Hyde, supra*, 466 U.S. at ____, 104 S.Ct. at 1560-61.

Yet the evil which is allegedly generated by the defendants' initiation fee arrangement is the same as that generated by traditional unlawful tying arrangements—competition in the market for one product is restrained due to the seller's exploitation of its control over another product. *See id.* at ____, 104 S.Ct. at 1558-59. Thus, even though a proper tying claim was not alleged in the Association's complaint, the factual allegations made in the complaint may support a conclusion that the defendants' initiation fee arrangement constitutes an unreasonable "restraint of trade", 15 U.S.C. § 1, in violation of the antitrust laws, *with the Association's tying argument serving only as an analogy* for analyzing the lawfulness of the defendants' initiation fee arrangement. *See Federal Trade Commission v. Brown Shoe Co., supra*, 384 U.S. at 321, 86 S.Ct. at 1504 (there was no "sale" of the tying product and the chief attraction of the tying product was its no cost feature, yet the Supreme Court stated that the arrangement violated the policy of the antitrust laws and held that the arrangement was an unfair trade practice under Section 5 of the Federal Trade Commission Act); 2 R. Callmann, *Unfair Competition, Trademarks and Monopolies*, § 10.18 at 107-08 (4th ed. 1982) (use of tying arrangement as an

analogy). Accordingly, we reverse the dismissal of count sixteen of the Association's complaint.

4. Pendent State Law Claims

Counts seven through fourteen of the Association's complaint raised various state law claims premised upon breach of contract and fraud theories. The district court dismissed these claims without prejudice. This decision was proper in this case in light of the court's early dismissal of all of the federal claims. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Koke v. Stifel, Nicolaus & Co.,* 620 F.2d 1340, 1346 (8th Cir.1980). On appeal, however, we have reversed the dismissal of two of the federal claims. Accordingly, we vacate the dismissal of the state law claims and remand so that the court may reconsider its decision whether to hear the state law claims in view of our decision on appeal.

CONCLUSION

We affirm the dismissal of the Land Sales Act claims (counts one through six), reverse the dismissal of the RICO (count fifteen) and antitrust claims (count sixteen), vacate the dismissal of the state law claims (counts seven through fourteen), and remand for proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-2577C(3)

Terre Du Lac Association, Inc.,
Plaintiff,

v.

Terre Du Lac, Inc., et al.,
Defendants.

August 31, 1984

Robert H. Brownlee, Thompson & Mitchell, St. Louis, Mo., for plaintiff.

Donald L. James, St. Louis, Mo., William J. Garmisa, Mitchell S. Goldghen, Nathan H. Lichtenstein, Greenberg, Keele, Lunn & Aronberg, Chicago, Ill., Joseph P. Conran, Maxine I. Lipeles, Dorothy White-Coleman, Husch, Eppenberger, Donohue, Elson & Cornfeld, St. Louis, Mo., John W. Reid, II, Schnapp, Graham & Reid, Fredericktown, Mo., Richard S. Brownlee, III, Jefferson City, Mo., for defendants.

MEMORANDUM

HUNGATE, District Judge.

Numerous pretrial motions are pending in this action, including four motions to dismiss as to which the Court heard oral argument on August 9, 1984. The action is premised upon a sixteen-count complaint arising out of defendants' actions with regard to the sale of land in a particular subdivision.

Initially, and apart from the merits of the pending motions, the court declines to exercise pendent jurisdiction over counts seven through fourteen. With the Court having, as it does, some 360 pending lawsuits, justice and the effective administration of courts are best served by permitting plaintiff's eight pendent counts to be dealt with in state court.[1] As noted by Congressman Neal Smith, Chairman of the House Appropriation Committee's Subcommittee on Commerce, Justice, State and Judiciary, in an interview published in *The Third Branch,* vol. 16, no. 8 (Aug. 1984), the judiciary can alter its own workload to some extent for the purpose of dealing with increasing caseloads. The courts may some day have to cease looking elsewhere for help and examine their own operations and rulings in situations where alternative remedies are available and are adequate to compensate for any injuries sustained.

The court cannot be governed by, but must not be oblivious to, the docket impact of its rulings. For example, district courts face an incipient epidemic of civil RICO treble damage cases. If the present litigation blizzard continues unabated, simply adding judges will not remedy the problems of justice delayed being justice denied. Accordingly, plaintiff's state law claims will be dismissed without prejudice.

Defendants, in their four separate motions to dismiss plaintiff's amended complaint, urge dismissal of each of the remaining eight counts. Counts one through six are based on the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 et seq. (Land Sales Act); count fifteen is based on the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq.; and

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[1] Anyone who disagrees with this proposition should attempt the formulation of suitable, comprehensible jury instructions for a case with nine parties, eight federal counts, and eight state counts.

count sixteen is based on the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. (Sherman Act).

Plaintiff association purports to sue both on its own behalf and for its members as purchasers in the Terre du Lac subdivision. Essentially, plaintiff's complaint seeks redress for injuries allegedly sustained as a result of unfulfilled promises as to numerous aspects of living in the subdivision. Specifically, plaintiff complains of unfinished roads, water and sewage systems, failure to transfer ownership of various amenities to the association, utility service charges, and use of the country club facilities.

As noted above, counts one through six allege violations of the Land Sales Act, which provides that "[a] purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale or lease was made in violation of section 1703(a) of this title." § 1709(a). Clearly, the plaintiff association does not have standing to sue on its own behalf as to these counts, since it does not allege any purchase or lease from defendants. Plaintiff asserts, however, that it has associational standing to represent the claims of its members under these counts. Defendants vigorously contest this assertion.

In *Warth v. Seldin,* 422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975), the Court found that an association could have representative standing, even without injury to itself, so long as any one member satisfies the requirement of justiciability and "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensible to proper resolution of the cause. . . ." The requirements for associational standing were further clarified in *Hunt v. Washington Apple Advertising Commission,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977):

> Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

In *Hunt, id.*, a Washington state agency sought to challenge the constitutionality of a North Carolina statute requiring that all apples sold or shipped into North Carolina in closed containers be identified by only the applicable federal grade or a designation that the apples were not graded. The Supreme Court held that the state agency did have associational standing, noting that "neither the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context." *Id.* at 344, 97 S.Ct. at 2442.

Assuming, *arguendo,* that plaintiff fulfills the first two *Hunt* requirements for associational standing, the Court finds that plaintiff fails to satisfy the third requirement that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Counts one, two, four, and the portions of count six which incorporate the first three counts, are based on defendants' alleged fraudulent representations and course of business as to plaintiff's members. That being the case, it is clear that each injured party must participate in the lawsuit in order to divulge the extent of the misrepresentation to which the purchaser was exposed.

Plaintiff argues that it can establish the existence and breach of promises without the need of *each* individual member, Memorandum in Opposition to Defendants' Motions to Dismiss Plaintiff's First Amended Complaint at 14, and that so long as this is established as to a sufficient number

of members to justify specific performance, there is no need for individual participation. However, the Court does not agree with plaintiff's apparent contention that the third *Hunt* requirement precludes associational standing only when the nature of the relief sought requires individual participation by each member. Rather, both the relief and the claim must be able to proceed without participation of individual members. Although plaintiff's associational requests for relief do not require such participation, their claims of fraud, upon which the requests for relief are predicated, must each be supported with testimony as to particular fraudulent misrepresentations. This, in turn, requires individual participation by individual members alleging injury. *See, i.e., Harris v. McRae,* 448 U.S. 297, 321, 100 S.Ct. 2671, 2690, 65 L.Ed.2d 784 (1980) (women's group lacked standing to raise free exercise challenge to Hyde Amendment, since free exercise case necessitates showing of coercive effect of enactment as it operates against individual in practice of religion).

This reasoning does not apply to count three or to the portion of count six which charges aiding and abetting as to count three. Count three alleges injury resulting from the issuance of false property reports. To establish defendants' liability for false property reports under the Land Sales Act, "a plaintiff is not required to prove that each purchaser relied in some way on the omission or misrepresentation but only that a material misrepresentation or omission existed in the statement of record at the time the property was sold." *Bryan v. Amrep Corp.*, 429 F.Supp. 313, 317 (S.D.N.Y. 1977). Neither the nature of the claim asserted nor the relief requested requires individual participation.

Nonetheless, the Court finds that plaintiff also lacks standing as to these claims under the reasoning set forth in *Associated General Contractors of North Dakota v. Otter*

Tail Power Co., 611 F.2d 684 (8th Cir. 1979).[2] In that case, a nonprofit association, with both union and nonunion general contractors as members, alleged that an agreement between defendant corporations and numerous labor unions violated antitrust and state labor laws. The Eighth Circuit held that "[t]he association is clearly not in a position to speak for its members.... Their status and interests are too diverse and the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members." *Id.* at 691. The Court stated in support:

> Some members are not qualified and others are not willing to work on the project; some stand to benefit from working on the project under the Agreement and still others will be hurt by not being able to do so.

Id. Significantly, the Court's finding of potential conflict was made despite the fact that the association had voted unanimously to bring the lawsuit, observing that it is the Court's responsibility to determine whether members' interests required individual representation. *Id.*

Here, the Court need not search extensively in order to find potential conflict. Some members, as argued by defendants, may believe that the value of their property is diminished by the very fact of this lawsuit, or may find that it is not in their best interests to have their mandatory dues expended in this fashion. One defendant is also a board member of the plaintiff association.

As noted in *Minnesota Public Interest Research Group v. Selective Service System*, 557 F.Supp. 925, 935 (D.Minn. 1983), the Eighth Circuit "appears fairly ready to find that a diversity

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[2] This reasoning is equally applicable to the Land Sales Act counts disposed of *supra*.

of view necessitates individualized participation, preventing representational standing." In light of the Eighth Circuit's holding, the Court must reject plaintiff's argument for the more liberal approach taken by the Tenth Circuit in *National Collegiate Athletic Association v. Califano,* 622 F.2d 1382 (10th Cir. 1980). Accordingly, all of plaintiff's claims under the Land Sales Act must be dismissed without prejudice to the right of any individual members to seek relief on their own behalf.

Plaintiff's lack of associational standing, as set forth above in regard to its members' claims under the Land Sales Act, also mandates dismissal of its members' claims in counts fifteen and sixteen. In these latter two counts, however, under RICO and the Sherman Act, plaintiff has asserted standing on its own behalf in addition to alleging associational standing. The Court, therefore, addresses plaintiff's claims under these counts separately.

As to plaintiff's RICO count, the Court will sustain defendants' motions to dismiss for the reason that none of the named defendants have been criminally convicted of any of the predicate acts listed in RICO.[3] The "pattern of racketeering activity" alleged by plaintiff consists of mail fraud, in that defendants are charged with mailing false property reports, and false representations to potential purchasers, and receiving checks from purchasers through the mail. However, as conceded orally by counsel for plaintiff, none of these defendants have been convicted of any of the alleged predicate acts of mail fraud.

In a recent and well-reasoned decision, the Second Circuit has determined that criminal conviction of a predicate act must precede a private civil suit under RICO. *Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482 (2d Cir. 1984). In *Sedima,* the

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[3] The determination whether a prior criminal conviction is a prerequisite to a civil RICO recovery was left open in the recent case of *Alexander Grant and Company v. Tiffany Industries, Inc.,* 742 F.2d 408 (8th Cir. 1984).

distinguished Second Circuit examined the statute itself, its legislative history, and previous case law; all of which, it concluded, suggest the necessity of restricting the availability of RICO's civil penalties to those persons whose potential defendant(s) have been found criminally guilty of committing a predicate act. Otherwise, RICO would "permit defendants in every 'garden-variety' fraud or securities violation case to be stigmatized as 'racketeers,' on the basis of a preponderance of the evidence...." *Id.*, at 503.

To find otherwise would also allow treble damages to be awarded on only a preponderance of the evidence, and would further have a severe effect on the court's dockets.

The Court also finds plaintiff's antitrust claim on its own behalf to be without merit. In count sixteen, plaintiff alleges that defendants are violating antitrust law by way of an illegal tie-in arrangement between golf memberships in the Terre du Lac Golf and Country Club and lots offered for sale by defendants in the subdivision. Plaintiff complains of defendants' practice of waiving the membership initiation fee for persons whose lot is purchased from defendants, whereas those persons who purchase lots from anyone else and desire to obtain a golf membership must pay a substantial initiation fee. Plaintiff alleges that this practice precludes sellers from obtaining the fair market value of their lots.

In arguing the merits of defendants' motions to dismiss, all parties rely on the recently decided case of *Jefferson Parish Hospital District No. 2 v. Hyde*, ____ U.S. ____, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). As noted therein, "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Id.* at 1558.

The Court agrees with defendants that no such tying is alleged by plaintiff's complaint, and that plaintiff has failed to state a claim for which relief could be granted under the antitrust laws. Purchasers are not required to buy golf club memberships in order to buy land in the subdivision, nor are they required to buy land from the defendants in order to purchase golf club memberships. Accordingly, the Court finds that count sixteen must be dismissed.

Also pending in this action is a motion to intervene as defendant by the Missouri Public Service Commission and a motion to vacate the Court's August 9, 1984, protective order. Because this order dismisses plaintiff's complaint in its entirety, those motions are moot.

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that the Court declines to exercise pendent jurisdiction as to Counts VII through XIV, and those counts are dismissed without prejudice.

IT IS HEREBY FURTHER ORDERED that the motion to dismiss filed by defendants Terre du Lac, Inc., and James O. Kwon be and the same is granted.

IT IS HEREBY FURTHER ORDERED that the motion to dismiss filed by defendant CIT Corporation be and the same is granted.

IT IS HEREBY FURTHER ORDERED that the motion to dismiss filed by defendants Terre du Lac Golf and Country Club, Inc., Terre du Lac Country Club Associates, Sensibar Enterprises, Inc., and Moill, Ltd., be and the same is granted.

IT IS HEREBY FURTHER ORDERED that the motion to intervene filed by the Missouri Public Service Commission be and the same is denied as moot.

IT IS HEREBY FURTHER ORDERED that the motion to vacate the protective order entered August 9, 1984, be and the same is denied as moot.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE UNITED STATES

No. 84-2296-EM

Terre Du Lac Association, Inc., etc.
Appellant,

vs.

Terre Du Lac, Inc., et al.,
Appellees.

Appeal from the United States District Court
For The Eastern District of Missouri

Appellee's petitions for rehearing en banc have been considered by the Court and are denied.

Petitions for rehearing by the panel are also denied.

October 14, 1985

APPENDIX D

STATUTES INVOLVED

15 U.S.C. § 1701. Definitions

For the purposes of this chapter, the term—

(1) "Secretary" means the Secretary of Housing and Urban Development;

(2) "person" means an individual, or an unincorporated organization, partnership, association, corporation, trust, or estate;

(3) "subdivision" means any land which is located in any State or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan;

(4) "common promotional plan" means a plan, undertaken by a single developer or a group of developers acting in concert, to offer lots for sale or lease; where such land is offered for sale by such a developer or group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit or by a common name, such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotional plan;

(5) "developer" means any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision;

(6) "agent" means any person who represents, or acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lot or lots in a subdivision; but shall not include an attorney at law whose representation

of another person consists solely of rendering legal services;

(7)"blanket encumbrance" means a trust deed, mortgage, judgment, or any other lien or encumbrance, including an option or contract to sell or a trust agreement, affecting a subdivision or affecting more than one lot offered within a subdivision, except that such term shall not include any lien or other encumbrance arising as the result of the imposition of any tax assessment by any public authority;

(8) "interstate commerce" means trade or commerce among the several States or between any foreign country and any State;

(9) "State" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;

(10) "purchaser" means an actual or prospective purchaser or lessee of any lot in a subdivision;

(11) "offer" includes any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision.

§ 1702. Exemptions

Sale or lease of lots generally

(a) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to—

(1) the sale or lease of lots in a subdivision containing less than twenty-five lots;

(2) the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial

building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years;

(3) the sale of evidences of indebtedness secured by a mortgage or deed of trust on real estate;

(4) the sale of securities issued by a real estate investment trust;

(5) the sale or lease of real estate by any government or government agency;

(6) the sale or lease of cemetery lots;

(7) the sale or lease of lots to any person who acquires such lots for the purpose of engaging in the business of constructing residential, commercial, or industrial buildings or for the purpose of resale or lease of such lots to persons engaged in such business; or

(8) the sale or lease of real estate which is zoned by the appropriate governmental authority for industrial or commercial development or which is restricted to such use by a declaration of covenants, conditions, and restrictions which has been recorded in the official records of the city or county in which such real estate is located, when—

(A) local authorities have approved access from such real estate to a public street or highway;

(B) the purchaser or lessee of such real estate is a duly organized corporation, partnership, trust, or business entity engaged in commercial or industrial business;

(C) the purchaser or lessee of such real estate is represented in the transaction of sale or lease by a representative of its own selection;

(D) the purchaser or lessee of such real estate affirms in writing to the seller or lessor that it either (i) is purchasing or leasing such real estate substantially for its own use, or (ii) has a binding commitment to sell, lease, or sublease such real estate to an entity which meets the requirements of subparagraph (B), is engaged in commercial or industrial business, and is not affiliated with the seller, lessor, or agent thereof; and

(E) a policy of title insurance or a title opinion is issued in connection with the transaction showing that title to the real estate purchased or leased is vested in the seller or lessor, subject only to such exceptions as may be approved in writing by such purchaser or the lessee prior to recordation of the instrument of conveyance or execution of the lease, but (i) nothing herein shall be construed as requiring the recordation of a lease, and (ii) any purchaser or lessee may waive, in writing in a separate document, the requirement of this subparagraph that a policy of title insurance or title opinion be issued in connection with the transaction.

Sale or lease of lots subject to other statutory registration and disclosure requirements

(b) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions requiring registration and disclosure (as specified in section 1703(a)(1) of this title and sections 1704 through 1707 of this title) shall not apply to—

(1) the sale or lease of lots in a subdivision containing fewer than one hundred lots which are not exempt under subsection (a) of this section;

(2) the sale or lease of lots in a subdivision if, within the twelve-month period commencing on the date of the first

sale or lease of a lot in such subdivision after the effective date of this subsection or on such other date within that twelve-month period as the Secretary may prescribe, not more than twelve lots are sold or leased, and the sale or lease of the first twelve lots in such subdivision in any subsequent twelve-month period, if not more than twelve lots have been sold or leased in any preceding twelve-month period after the effective date of this subsection;

(3) the sale or lease of lots in a subdivision if each non-contiguous part of such subdivision contains not more than twenty lots, and if the purchaser or lessee (or spouse thereof) has made a personal, on-the-lot inspection of the lot purchased or leased, prior to signing of the contract or agreement to purchase or lease;

(4) the sale or lease of lots in a subdivision in which each of the lots is at least twenty acres (inclusive of easements for ingress and egress or public utilities);

(5) the sale or lease of a lot which is located within a municipality or county where a unit of local government specifies minimum standards for the development of subdivision lots taking place within its boundaries, when—

(A)(i) the subdivision meets all local codes and standards, and (ii) each lot is either zoned for single family residences or, in the absence of a zoning ordinance, is limited exclusively to single family residences;

(B)(i) the lot is situated on a paved street or highway which has been built to standards applicable to streets and highways maintained by the unit of local government in which the subdivision is located and is acceptable to such unit, or, where such street or highway is not complete, a bond or other surety acceptable to the municipality or county in the full

amount of the cost of completing such street or highway has been posted to assure completion to such standards, and (ii) the unit of local government or a homeowners association has accepted or is obligated to accept the responsibility of maintaining such street or highway, except that, in any case in which a homeowners association has accepted or is obligated to accept such responsibility, a good faith written estimate of the cost of carrying out such responsibility over the first ten years of ownership or lease is provided to the purchaser or lessee prior to the signing of the contract or agreement to purchase or lease;

(C) at the time of closing, potable water, sanitary sewage disposal, and electricity have been extended to the lot or the unit of local government is obligated to install such facilities within one hundred and eighty days, and, for subdivisions which do not have a central water or sewage disposal system, rather than installation of water or sewer facilities, there must be assurances that an adequate potable water supply is available year-raound and that the lot is approved for the installation of a septic tank;

(D) the contract of sale requires delivery of a warranty deed (or, where such deed is not commonly used in the jurisdiction where the lot is located, a deed or grant which warrants that the grantor has not conveyed the lot to another person and that the lot is free from encumbrances made by the grantor or any other person claiming by, through, or under him) to the purchaser within one hundred and eighty days after the signing of the sales contract;

(E) at the time of closing, a title insurance binder or a title opinion reflecting the condition of the title shall be in existence and issued or presented to the pur-

chaser or lessee showing that, subject only to such exceptions as may be approved in writing by the purchaser or lessee at the time of closing, marketable title to the lot is vested in the seller or lessor;

(F) the purchaser or lessee (or spouse thereof) has made a personal, on-the-lot inspection of the lot purchased or leased, prior to signing of the contract or agreement to purchase or lease; and

(G) there are no offers, by direct mail or telephone solicitation, of gifts, trips, dinners, or other such promotional techniques to induce prospective purchasers or lessees to visit the subdivision or to purchase or lease a lot;

(6) the sale or lease of a lot, if a mobile home is to be erected or placed thereon as a residence, where the lot is sold as a homesite by one party and the home by another, under contracts that obligate such sellers to perform, contingent upon the other seller carrying out its obligations so that a completed mobile home will be erected or placed on the completed homesite within a period of two years, and provide for all funds received by the sellers to be deposited in escrow accounts (controlled by parties independent of the sellers) until the transactions are completed, and further provide that such funds shall be released to the buyer on demand without prejudice if the land with the mobile home erected or placed thereon is not conveyed within such two-year period. Such homesite must conform to all local codes and standards for mobile home subdivisions, if any, must provide potable water, sanitary sewage disposal, electricity, access by roads, the purchaser must receive marketable title to the lot, and where common facilities are to be provided, they must be completed or fully funded;

(7) (A) the sale or lease of real estate by a developer who is engaged in a sales operation which is intrastate in nature. For purposes of this exemption, a lot may be sold only if—

(i) the lot is free and clear of all liens, encumbrances, and adverse claims;

(ii) the purchaser or lessee (or spouse thereof) has made a personal on-the-lot inspection of the lot to be purchased or leased;

(iii) each purchaser or lease agreement contains—

(I) a clear and specific statement describing a good faith estimate of the year of completion of, and the party responsible for, providing and maintaining the roads, water facilities, sewer facilities and and any existing or promised amenities; and

(II) a nonwaivable provision specifying that the contract or agreement may be revoked at the option of the purchaser or lessee until midnight of the seventh day following the signing of such contract or agreement or until such later time as may be required pursuant to applicable State laws; and

(iv) the purchaser or lessee has, prior to the time the contract or lease is entered into, acknowledged in writing the receipt of a written statement by the developer containing good faith estimates of the cost of providing electric, water, sewer, gas, and telephone service to such lot.

(B) As used in subparagraph (A)(i) of this paragraph, the terms "liens", "encumbrances", and "adverse claims" do not include United States land patents and similar Federal grants or reservations, property reservations which land developers commonly convey or dedicate to local bodies or public utilities for the purpose of bringing public services to the land being developed, taxes and assessments imposed by a State, by any other public body having authority to assess and tax property, or by a property owners' association, which, under applicable State or local law, constitute liens on the property before they are due and payable or beneficial property restrictions which

would be enforceable by other lot owners or lessees in the subdivision, if—

(i) the developer, prior to the time the contract of sale or lease is entered into, has furnished each purchaser or lessee with a statement setting forth in descriptive and concise terms all such liens, reservations, taxes, assessments and restrictions which are applicable to the lot to be purchased or leased; and

(ii) receipt of such statement has been acknowledged in writing by the purchaser or lessee.

(C) For the purpose of this paragraph, a sales operation is "intrastate in nature" if the developer is subject to the laws of the State in which the land is located, and each lot in the subdivision, other than those which are exempt under subsection (a), (b)(6), or (b)(8) of this section, is sold or leased to residents of the State in which the land is located; or

(8) the sale or lease of a lot in a subdivision containing fewer than three hundred lots if—

(A) the principal residence of the purchaser or lessee is within the same standard metropolitan statistical area, as defined by the Office of Management and Budget, as the lot purchased or leased;

(B) the lot is free and clear of liens (such as mortgages, deeds of trust, tax liens, mechanics liens, or judgments) at the time of the signing of the contract or agreement and until a deed is delivered to the purchaser or the lease expires. As used in this subparagraph, the term "liens" does not include (i) United States land patents and similar Federal grants or reservations, (ii) property reservations which land developers commonly convey or dedicate to local bodies or public utilities for the purpose of bringing public services to the land being developed. (iii) taxes and asseessments imposed by a State, by any other public body

having authority to assess and tax property, or by a property owners' association, which, under applicable State or local law, constitute liens on the property before they are due and payable or beneficial property restrictions which would be enforceable by other lot owners or lessees in the subdivision, or (iv) other interests described in regulations prescribed by the Secretary;

(C) the purchaser or lessee (or spouse thereof) has made a personal on-the-lot inspection of the lot to be purchased or leased;

(D) each purchase or lease agreement contains (i) a clear and specific statement describing a good faith estimate of the year of completion of and the party responsible for providing and maintaining the roads, water facilities, sewer facilities and any existing or promised amenities; and (ii) a nonwaivable provision specifying that the contract or agreement may be revoked at the option of the purchaser or lessee until midnight of the seventh day following the signing of such contract or agreement or until such later time as may be required pursuant to applicable State laws;

(E) the purchaser or lessee has, prior to the time the contract or lease is entered into, acknowledged in writing receipt of a written statement by the developer setting forth (i) in descriptive and concise terms all liens, reservations, taxes, assessments, beneficial property restrictions which would be enforceable by other lot owners or lessees in the subdivision, and adverse claims which are applicable to the lot to be purchased or leased, and (ii) good faith estimates of the cost of providing electric, water, sewer, gas, and telephone service to such lot;

(F) the developer executes and supplies to the purchaser a written instrument designating a person within the State of residence of the purchaser as his agent for service of process and acknowledging that the developer submits to

the legal jurisdiction of the State in which the purchaser or lessee resides; and

(G) the developer executes a written affirmation to the effect that he has complied with the provisions of this paragraph, such affirmation to be given on a form provided by the Secretary, which shall include the following: the name and address of the developer; the name and address of the purchaser or lessee; a legal description of the lot; an affirmation that the provisions of this paragraph have been complied with; a statement that the developer submits to the jurisdiction of this title with regard to the sale or lease; and the signature of the developer.

Rules and regulations

(c) The Secretary may from time to time, pursuant to rules and regulations issued by him, exempt from any of the provisions of this chapter any subdivision or any lots in a subdivision, if he finds that the enforcement of this chapter with respect to such subdivision or lots is not necessary in the public interest and for the protection of purchasers by reason of the small amount involved or the limited character of the public offering.

15 U.S.C. § 1703. Requirements respecting sale or lease of lots

Prohibited activities

(a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—

(1) with respect to the sale or lease of any lot not exempt under section 1702 of this title—

(A) to sell or lease any lot unless a statement of record with respect to such lot is in effect in accordance with section 1706 of this title;

(B) to sell or lease any lot unless a printed property report, meeting the requirements of section 1707 of this title, has been furnished to the purchaser or lessee in advance of the signing of any contract or agreement by such purchaser or lessee;

(C) to sell or lease any lot where any part of the statement of record or the property report contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein pursuant to sections 1704 through 1707 of this title or any regulations thereunder; or

(D) to display or deliver to prospective purchasers or lessees advertising and promotional material which is inconsistent with information required to be disclosed in the property report; or

(2) with respect to the sale or lease, or offer to sell or lease, any lot not exempt under section 1702(a) of this title—

(A) to employ any device, scheme, or artifice to defraud;

(B) to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision;

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser; or

(D) to represent that roads, sewers, water, gas, or electric service, or recreational amenities will be pro-

vided or completed by the developer without stipulating in the contract of sale or lease that such services or amenities will be provided or completed.

Revocation of nonexempt contract or agreement at option of purchaser or lessee; time limit

(b) Any contract or agreement for the sale or lease of a lot not exempt under section 1702 of this title may be revoked at the option of the purchaser or lessee until midnight of the seventh day following the signing of such contract or agreement or until such later time as may be required pursuant to applicable State laws, and such contract or agreement shall clearly provide this right.

Revocation of contract or agreement at option of purchaser or lessee where required property report not supplied

(c) In the case of any contract or agreement for the sale or lease of a lot for which a property report is required by this chapter and the property report has not been given to the purchaser or lessee in advance of his or her signing such contract or agreement, such contract or agreement may be revoked at the option of the purchaser or lessee within two years from the date of such signing, and such contract or agreement shall clearly provide this right.

Additional authority for revocation of nonexempt contract or agreement at option of purchaser or lessee; time limit; applicability

(d) Any contract or agreement which is for the sale or lease of a lot not exempt under section 1702 of this title and which does not provide—

(1) a description of the lot which makes such lot clearly identifiable and which is in a form acceptance for recording by the appropriate public official responsible for maintaining land records in the jurisdiction in which the lot is located;

(2) that, in the event of a default or breach of the contract or agreement by the purchaser or lessee, the seller or lessor (or succcessor thereof) will provide the purchaser or lessee with written notice of such default or breach and of the opportunity, which shall be given such purchaser or lessee, to remedy such default or breach within twenty days after the date of the receipt of such notice; and

(3) that, if the purchaser or lessee loses rights and interest in the lot as a result of a default or breach of the contract or agreement which occurs after the purchaser or lessee has paid 15 per centum of the purchase price of the lot, excluding any interest owed under the contract or agreement, the seller or lessor (or successor thereof) shall refund to such purchaser or lessee any amount which remains after subtracting (A) 15 per centum of the purchase price of the lot, excluding any interest owed under the contract or agreement, or the amount of damages incurred by the seller or lessor (or successor thereof) as a result of such breach, whichever is greater, from (B) the amount paid by the purchaser or lessee with respect to the purchase price of the lot, excluding any interest paid under the contract or agreement,

may be revoked at the option of the purchaser or lessee for two years from the date of the signing of such contract or agreement. This subsection shall not apply to the sale of a lot for which, within one hundered and eighty days after the signing of the sales contract, the purchaser receives a warranty deed (or, where such deed is not commonly used in the jurisdiction where the lot is located, a deed or grant that warrants at least that the grantor has not conveyed the lot to another person and that the lot is free from encumbrances made by the grantor or any other person claiming by, through, or under him or her).

Repayment of purchaser or lessee upon revocation of all all money paid under contract or agreement to seller or lessor

(e) If a contract or agreement is revoked pursuant to subsection (b), (c), or (d) of this section, if the purchaser or lessee tenders to the seller or lessor (or successor thereof) an instrument conveying his or her rights and interests in the lot, and if the rights and interests and the lot are in a condition which is substantially similar to the condition in which they were conveyed or purported to be conveyed to the purchaser or lessee, such purchaser or lessee shall be entitled to all money paid by him or her under such contract or agreement.

15 U.S.C. § 1704. Registration of subdivisions

Filing of statement of record

(a) A subdivision may be registered by filing with the Secretary a statement of record, meeting the requirements of this chapter and such rules and regulations as may be prescribed by the Secretary in furtherance of the provisions of this chapter. A statement of record shall be deemed effective only as to the lots specified therein.

Payment of fees; use by Secretary

(b) At the time of filing a statement of record, or any amendment thereto, the developer shall pay to the Secretary a fee, not in excess of $1,000, in accordance with a schedule to be fixed by the regulations of the Secretary, which fees may be used by the Secretary to cover all or part of the cost of rendering services under this chapter, and such expenses as are paid from such fees shall be considered non-administrative.

Filing deemed to have taken place upon receipt of statement of record accompanied by fee

(c) The filing with the Secretary of a statement of record, or of an amendment thereto, shall be deemed to have taken place upon the receipt thereof, accompanied by payment of the fee required by subsection (b) of this section.

Availability of information to public

(d) The information contained in or filed with any statement of record shall be made available to the public under such regulations as the Secretary may prescribe and copies thereof shall be furnished to every applicant at such reasonable charge as the Secretary may prescribe.

§ 1705. Information required in statement of record

The statement of record shall contain the information and be accompanied by the documents specified hereinafter in this section—

(1) the name and address of each person having an interest in the lots in the subdivision to be covered by the statement of record and the extent of such interest;

(2) a legal description of, and a statement of the total area included in, the subdivision and a statement of the topography thereof, together with a map showing the division proposed and the dimensions of the lots to be covered by the statement of record and their relation to existing streets and roads;

(3) a statement of the condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions and covenants applicable thereto;

(4) a statement of the general terms and conditions, including the range of selling prices or rents at which it is proposed to dispose of the lots in the subdivision;

(5) a statement of the present condition of access to the subdivision, the existence of any unusual conditions relating to noise or safety which affect the subdivision and are known to the developer, the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to near-

by municipalities, and the nature of any improvements to be installed by the developer and his estimated schedule for completion;

(6) in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill obligations under the instrument or instruments creating such encumbrance and the steps, if any, taken to protect the purchaser in such eventuality;

(7)(A) copy of its articles of incorporation, with all amendments thereto, if the developer is a corporation; (B) copies of all instruments by which the trust is created or declared, if the developer is a trust; (C) copies of its articles of partnership or association and all other papers pertaining to its organization, if the developer is a partnership, unincorporated association, joint stock company, or any other form of organization; and (D) if the purported holder of legal title is a person other than developer, copies of the above documents for such person;

(8) copies of the deed or other instrument establishing title to the subdivision in the developer or other person and copies of any instrument creating a lien or encumbrance upon the title of developer or other person or copies of the opinion or opinions of counsel in respect to the title to the subdivision in the developer or other person or copies of the title insurance policy guaranteeing such title;

(9) copies of all forms of conveyance to be used in selling or leasing lots to purchasers;

(10) copies of instruments creating easements or other restrictions;

(11) such certified and uncertified financial statements of the developer as the Secretary may require; and

(12) such other information and such other documents and certifications as the Secretary may require as being reasonably necessary or appropriate for the protection of purchasers.

15 U.S.C. § 1706. Effective date of statements of record and amendments thereto

Thirtieth day after filing or such earlier date as determined by Secretary: consolidation of subsequent statement with earlier recording

(a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

Incomplete or inaccurate statements of record

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incomplete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the amendment, but prior to the date the statement or

amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

Amendment of statement of record

(c) If, at any time subsequent to the effective date of a statement of record, a change shall occur affecting any material fact required to be contained in the statement, the developer shall promptly file an amendment thereto. Upon receipt of any such amendment, the Secretary may, if he determines such action to be necessary or appropriate in the public interest or for the protection of purchasers, suspend the statement of record until the amendment becomes effective.

Suspension of statement of record containing untrue statement or omission to state material fact; notice and hearing; termination of order of suspension

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

Examination to determine issuance of order; access to records; order suspending statement of record upon failure to cooperate

(e) The Secretary is hereby empowered to make an examination in any case to determine whether an order should issue

under subsection (d) of this section. In making such examination, the Secretary or anyone designated by him shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the developer, any agents or any other person, in respect of any matter relevant to the examination. If the developer or any agents shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of an order suspending the statement of record.

Service of notices

(f) Any notice required under this section shall be sent to or served on the developer or his authorized agent.

15 U.S.C. § 1707. Information required in property report; use for promotional purposes

(a) A property report relating to the lots in a subdivision shall contain such of the information contained in the statement of record, and any amendments thereto, as the Secretary may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1705 of this title. A property report shall also contain such other information as the Secretary may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of purchasers.

(b) The property report shall not be used for any promotional purposes before the statement of record becomes effective and then only if it is used in its entirety. No person may advertise or represent that the Secretary approves or recommends the subdivision or the sale or lease of lots therein. No portion of the property report shall be underscored, italicized, or printed in larger or bolder type than the balance of the statement unless the Secretary requires or permits it.

§ 1708. Certification of substantially equivalent State law

Criteria; request by State

(a)(1) A State shall be certified if the Secretary determines—

(A) that, when taken as a whole, the laws and regulations of the State applicable to the sale or lease of lots not exempt under section 1702 of this title require the seller or lessor of such lots to disclose information which is at least substantially equivalent to the information required to be disclosed by section 1707 of this title; and

(B) that the State's administration of such laws and regulations provides, to the maximum extent practicable, that such information is accurate.

(2) In the case of any State which is not certified under paragraph (1), such State shall be certified if the Secretary determines—

(A) that, when taken as a whole, the laws and regulations of the State applicable to the sale or lease of lots not exempt under section 1702 of this title provide sufficient protection for purchasers and lessees with respect to the matters for which information is required to be disclosed by section 1707 of this title but which is not required to be disclosed by such State's laws and regulations; and

(B) that the State's administration of such laws and regulations provides, to the maximum extent practicable, that (i) information required to be disclosed by such laws and regulations is accurate, and (ii) sufficient protection for purchasers and lessees is made available with respect to the matters for which information is not required to be disclosed.

(3) Any State requesting certification must agree to accept a property report covering land located in another certified State but offered for sale or lease in the State requesting certification

if the property report has been approved by the other certified State. Such property report shall be the only property report required by the State with respect to the sale or lease of such land.

Filing of State disclosure materials and related documentation for purposes of Federal statement of record and property report requirements; acceptance by Secretary

(b) After the Secretary has certified a State under subsection (a) of this section, the Secretary shall accept for filing under sections 1704 through 1707 of this title (and declare effective as the Federal statement of record and property report which shall be used in all States in which the lots are offered for sale or lease) disclosure materials found acceptable, and any related documentation required, by State authorities in connection with the sale or lease of lots located within the State. The Secretary may accept for such filing, and declare effective as the Federal statement of record and property report, such materials and documentation found acceptable by the State in connection with the sale or lease of lots located outside that State. Nothing in this subsection shall preclude the Secretary from exercising the authority conferred by subsections (d) and (e) of section 1706 of this title.

Notice to State upon failure to meet requirements and remedial action necessary for certification

(c) If a State fails to meet the standards for certification pursuant to subsection (a) of this section, the Secretary shall notify the State in writing of the changes in State law, regulation, or administration that are needed in order to obtain certification.

Periodic review of certified States' laws, regulations, and administration; withdrawal of certification

(d) The Secretary shall periodically review the laws and regulations, and the administration thereof, of States certified under subsection (a) of this section, and may withdraw such cer-

tification upon a determination that such laws, regulations, and the administration thereof, taken as a whole, no longer meet the requirements of subsection (a) of this section.

State and local governmental authorities affected; cooperation with State authorities

(e) Nothing in this chapter may be construed to prevent or limit the authority of any State or local government to enact and enforce with regard to the sale of land any law, ordinance, or code not in conflict with this chapter. In administering this chapter, the Secretary shall cooperate with State authorities charged with the responsibility of regulating the sale or lease of lots which are subject to this chapter.

15 U.S.C. § 1709. Civil liabilities

Violations; relief recoverable

(a) A purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale or lease was made in violation of section 1703(a) of this title. In a suit authorized by this subsection, the court may order damages, specific performance, or such other relief as the court deems fair, just, and equitable. In determining such relief the court may take into account, but not be limited to, the following factors: the contract price of the lot or leasehold; the amount the purchaser or lessee actually paid; the cost of any improvements to the lot; the fair market value of the lot or leasehold at the time relief is determined; and the fair market value of the lot or leasehold at the time such lot was purchased or leased.

Enforcement of rights by purchaser or lessee

(b) A purchaser or lessee may bring an action at law or in equity against the seller or lessor (or successor thereof) to enforce any right under subsection (b), (c), (d), or (e) of section 1703 of this title.

if the property report has been approved by the other certified State. Such property report shall be the only property report required by the State with respect to the sale or lease of such land.

Filing of State disclosure materials and related documentation for purposes of Federal statement of record and property report requirements; acceptance by Secretary

(b) After the Secretary has certified a State under subsection (a) of this section, the Secretary shall accept for filing under sections 1704 through 1707 of this title (and declare effective as the Federal statement of record and property report which shall be used in all States in which the lots are offered for sale or lease) disclosure materials found acceptable, and any related documentation required, by State authorities in connection with the sale or lease of lots located within the State. The Secretary may accept for such filing, and declare effective as the Federal statement of record and property report, such materials and documentation found acceptable by the State in connection with the sale or lease of lots located outside that State. Nothing in this subsection shall preclude the Secretary from exercising the authority conferred by subsections (d) and (e) of section 1706 of this title.

Notice to State upon failure to meet requirements and remedial action necessary for certification

(c) If a State fails to meet the standards for certification pursuant to subsection (a) of this section, the Secretary shall notify the State in writing of the changes in State law, regulation, or administration that are needed in order to obtain certification.

Periodic review of certified States' laws, regulations, and administration; withdrawal of certification

(d) The Secretary shall periodically review the laws and regulations, and the administration thereof, of States certified under subsection (a) of this section, and may withdraw such cer-

tification upon a determination that such laws, regulations, and the administration thereof, taken as a whole, no longer meet the requirements of subsection (a) of this section.

State and local governmental authorities affected; cooperation with State authorities

(e) Nothing in this chapter may be construed to prevent or limit the authority of any State or local government to enact and enforce with regard to the sale of land any law, ordinance, or code not in conflict with this chapter. In administering this chapter, the Secretary shall cooperate with State authorities charged with the responsibility of regulating the sale or lease of lots which are subject to this chapter.

15 U.S.C. § 1709. Civil liabilities

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Enforcement of rights by purchaser or lessee

(b) A purchaser or lessee may bring an action at law or in equity against the seller or lessor (or successor thereof) to enforce any right under subsection (b), (c), (d), or (e) of section 1703 of this title.

Amounts recoverable

(c) The amount recoverable in a suit authorized by this section may include, in addition to matters specified in subsections (a) and (b) of this section, interest, court costs, and reasonable amounts for attorneys' fees, independent appraisers' fees, and travel to and from the lot.

Contribution

(d) Every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment.

15 U.S.C. § 1710. Review of orders; jurisdiction; procedure; Conclusiveness of findings; addition evidence; modification of findings by Secretary; stay

(a) Any person, aggrieved by an order or determination of the Secretary issued after a hearing, may obtain a review of such order or determination in the court of appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order or determination, a written petition praying that the order or determination of the Secretary be modified or be set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the ocurt to the Secretary, and thereupon the Secretary shall file in the court the record upon which the order or determination complained of was entered, as provided in section 2112 of Title 28. No objection to an order or determination of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary. The finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of

the court that such additional evidence is material and taht there were reasonable grounds for failure to adduce such evidence in the hearing before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be adduced upon a hearing in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts by reason by the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the modification or setting aside of the original order. Upon the filing of such petition, the jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Secretary, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(b) The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by the court, operate as a stay of the Secretary's order.

15 U.S.C. § 1711. Limitation of actions

(a) No action shall be maintained under section 1709 of this title with respect to—

> (1) a violation of subsection (a)(1) or (a)(2)(D) of section 1703 of this title more than three years after the date of signing of the contract of sale or lease; or
>
> (2) a violation of subsection (a)(2)(A), (a)(2)(B), or (a)(2)(C) of section 1703 of this title more than three years after discovery of the violation or after discovery should have been made by the exercise of reasonable diligence.

(b) No action shall be maintained under section 1709 of this title to enforce a right created under subsection (b), (c), (d), or (e) of section 1703 of this title unless brought within three years

after the signing of the contract or lease, notwithstanding delivery of a deed to a purchaser.

15 U.S.C. § 1712. Contrary stipulations void

Any condition, stipulation, or provision binding any person acquiring any lot in a subdivision to waive compliance with any provision of this chapter or of the rules and regulations of the Secretary shall be void.

15 U.S.C. § 1713. Additional remedies

The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

15 U.S.C. § 1714. Investigations, injunctions, and prosecution of offenses

Permanent or temporary injunction or restraining order; jurisdiction

(a) Whenever it shall appear to the Secretary that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation prescribed pursuant thereto, he may, in his discretion, bring an action in any district court of the United States, or the United States District Court for the District of Columbia to enjoin such acts or practices, and, upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. The Secretary may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the appropriate criminal proceedings under this chapter.

Investigations; publication of information concerning violations

(b) The Secretary may, in his discretion, make such investigations as he deems necessary to determine whether any person has violated or is about to violate any provision of this chapter or any rule or regulation prescribed pursuant thereto, and may require or permit any person to file with him a statement in writing, under oath or otherwise as the Secretary shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Secretary is authorized, in his discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which he may deem necessary or proper to aid in the enforcement of the provisions of this chapter, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

Oaths and affirmations; subpena power

(c) For the purpose of any such investigation, or any other proceeding under this chapter, the Secretary, or any officer designated by him, is empowered to administer oats and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memorandums, or other records which the Secretary deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

Contempt; court order requiring attendance and testimony of witnesses; jurisdiction

(d) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers,

correspondence, memorandums, and other records and documents. And such court may issue an order requiring such person to appear before the Secretary or any officer designated by the Secretary, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found.

15 U.S.C. § 1715. Administration

Delegation of functions, duties, and powers; scope of delegation; appointment, etc., of delegates; right of appeal

(a) The authority and responsiblity for administering this chapter shall be in the Secretary of Housing and Urban Development who may delegate any of his functions, duties, and powers to employees of the Department of Housing and Urban Development or to boards of such employees, including functions, duties, and powers with respect to investigating, hearing, determining, ordering, or otherwise acting as to any work, business, or matter under this chapter. The persons to whom such delegations are made with respect to hearing functions, duties, and powers shall be appointed and shall serve in the Department in compliance with sections 3105, 3344, 5372, and 7521 of Title 5. The Secretary shall by rule prescribe such rights of appeal from the decisions of his administrative law judges to other administrative law judges or to other officers in the Department, to boards of officers or to himself, as shall be appropriate and in accordance with law.

Hearings

(b) All hearings shall be public and appropriate records thereof shall be kept, and any order issued after such hearing shall be based on the record made in such hearing which shall be conducted in accordance with the provisions of subchapter II of chapter 5, and chapter 7, of Title 5.

Procedures applicable

(c) The Secretary shall conduct all actions with respect to rulemaking or adjudication under this chapter in accordance with the provisions of chapter 5 of Title 5. Notice shall be given of any adverse action or final disposition and such notice and the entry of any order shall be accompanied by a written statement of supporting facts and legal authority.

15 U.S.C. § 1716. Unlawful representations

The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the Secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing.

15 U.S.C. § 1717. Penalties for violations

Any person who willfully violates any of the provisions of this chapter, or the rules and regulations prescribed pursuant thereto, or any person who willfully, in a statement of record filed under, or in a property report issued pursuant to, this chapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein, shall upon conviction be fined not more than $10,000 or imprisoned not more than five years, or both.

15 U.S.C. § 1718. Rules, regulations, and orders

The Secretary shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon him elsewhere in this chapter. For the purposes of his rules and regulations, the Secretary may classify persons and matters within his jurisdic-

tion and prescribe different requirements for different classes of persons or matters.

15 U.S.C. § 1719. Jurisdiction of offenses and suits

The district courts of the United States, the United States courts of any territory, and the United States District Court for the District of Columbia shall have jurisdiction of offenses and violations under this chapter and under the rules and regulations prescribed by the Secretary pursuant thereto, and concurrent with State courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter. Any such suit or action may be brought to enforce any liability or duty created by this chapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transact business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254 and 1291 of Title 28. No case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party. No costs shall be assessed for or against the Secretary in any proceeding under this chapter brought by or against him in the Supreme Court or such other courts.

15 U.S.C. § 1719a. Reports to Congress

The Secretary shall prepare and submit to the Congress on March 1,-1981, and biennially thereafter a report on the administration of this chapter and its impact upon the land development industry and purchasers and lessees of undeveloped land. Such report shall include but not be restricted to the analysis of—

(1) consumer and industry complaints and their resolution, with particular emphasis on the impact of various statutory and regulatory exemptions;

(2) the effect the State certification has had in encouraging States to provide protection to purchasers of undeveloped land; and

(3) efforts by the Secretary to simplify registration and disclosure procedures.

The report shall also contain such legislative recommendations as the Secretary deems advisable.

15 U.S.C. § 1720. Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out this chapter.

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. §1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.] —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code [18 USCS §§ 1 et seq.]: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), section 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to

embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 [11 USCS §§ 1 et seq.], fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4)"enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];
(9) "documentary material" includes any book, paper, document, record, recording, or other material; and
(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another

to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter [18 USCS § 1962] shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962 [18 USCS § 1962];

(2) any —

(A) interest in;
(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 [18 USCS § 1962]; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962 [18 USCS § 1962].

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) [Repealed]

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter [18 USCS § 1962] and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States

without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forefeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section.

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(i) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter. Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable

and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(j) Except as provided in subsection (m), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(l) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interest sof justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of

the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, pro-

hibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

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vs.

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Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

The issue presented by this cross-petition[1] is whether plaintiff association has standing to assert the individual claims of its members under the Interstate Land Sales Full Disclosure Act (Land Sales Act), 15 U.S.C. §§ 1701 et. seq., or under the Racketeering Influential and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 et seq.

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[1] To avoid confusion between "Petitioner" and "Respondents" on this cross-petition, we shall refer to the parties as they were designated in the District Court.

The lengthy summary of the Complaint contained in plaintiff's cross-petition provides little assistance in answering that legal question. Presumably, the goal is to embarrass defendants with a recitation of plaintiff's grandiose claims, the merits of which defendants vigorously deny. The only facts necessary to resolve this case are clearly set forth in the opinions of the District Court and the Court of Appeals.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Cross Petition Presents No Issues Of Significant Or Recurring Importance.

The cross petition seeks review of the circumstances under which a corporation or association may assert the individual claims of its shareholders/members. Unlike the issues raised by defendants' petition, that issue does not require the attention of this Court.

The general rule prohibiting a litigant from asserting the rights of another is well settled. *Singleton v. Wulff,* 428 U.S. 106, 113-114 (1976). In *Warth v. Seldin,* 422 U.S. 490 (1975), and *Hunt v. Washington Apple Advertising Commission,* 432 U.S. 333 (1977), this Court clearly set forth the exceptional circumstances in which an association may assert the individual rights of its members. The cross-petition thus involves no new legal principle; merely the application of settled law to the specific facts of this case. Such an issue is inherently unworthy of this Court's review.

II. Plaintiff's Arguments Clearly Establish The Absence Of Any Issue Of Significant Or Recurring Importance.

Defendants will briefly address the specific reasons plaintiff asserts for granting the cross-petition.

A. The Relationship Between the Petition and the Cross-Petition.

The principal issue raised by defendants' petition is whether detrimental reliance is a necessary element of a fraud-based RICO claim. Plaintiff acknowledges that this question is "an important issue of federal law that can be resolved under the facts of this case." Br. in opposition, at 6. Plaintiff claims that resolution of that issue also requires this Court to determine whether an association has standing to assert the rights of its members under the Land Sales Act.

Since the two issues have nothing to do with each other, plaintiff has invented the following tortured chain of "logic":

1. The Court of Appeals allowed plaintiff to assert the individual RICO claims of its members;

2. Defendants have petitioned for a writ of certiorari to review that adverse finding;

3. As a matter of judicial economy, this Court should also consider plaintiff's standing to assert individual claims under the Land Sales Act.

The premise of this argument is false. The Court of appeals did not hold that plaintiff had standing to assert the individual RICO claims of its members. Quite the contrary:

> "On appeal, the Association does not contest the District Court's finding that it lacks associational standing to pursue the RICO count *on behalf of its members*". (emphasis original)

App. at A-9. Since that ruling was favorable to the defendants, they did not — indeed could not — petition this Court to review it.

The Association now claims that the Court of Appeals misunderstood its position, and this Court should grant certiorari to correct the mistake. The appropriate relief for this sort of housekeeping detail is a petition for rehearing in the Court of Appeals — not review by this Court. No such petition was filed.

B. Associational Standing Under the Land Sales Act

Plaintiff contends that it may assert the individual claims of its members under the Land Sales Act, despite the inherently individual nature of the proof required by the statute. Plaintiff urges that this sweeping judicial revision would serve the "remedial purpose" of the statute.

The third part of the *Hunt* test examines whether the claim asserted and the relief requested require individual proof. 432 U.S. at 343-44. The Land Sales Act specifically requires individual proof to determine the proper remedy:

> "In a suit authorized by this subsection, the Court may order damages, specific performance, or such other relief as the Court deems fair, just, and equitable. In determining such relief the Court may take into account, but not be limited to, the following factors: the contract price of the lot or leasehold; the amount the purchaser or lessee actually paid; the cost of any improvements to the lot; the fair market value of the lot or leasehold at the time relief is determined; and the fair market value of the lot or leasehold at the time such lot was purchased or leased."

15 U.S.C. §1709(a). These issues are necessarily individual. That is precisely why the Court of Appeals determined that the Association did not satisfy the strict requirements for representational standing. App. at A-6-8.[2]

The Association does not challenge that conclusion. Instead, it asks this Court to dispense with the individual requirements enacted by Congress, and to construct instead a broad-brush injunctive remedy based solely on proof of a developer's violations, regardless of the purchasers' circumstances or the equities of the situation. Plaintiff attempts to justify the judicial legislating it seeks by appealing to the "broad remedial purposes" of the Land Sales Act. This Court has repeatedly refused such invitations:

> "Where the principal express civil remedy for misstatements in reports. . .is by its terms limited to purchasers and sellers of securities, we are extremely reluctant

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[2] The Association acknowledges that the same standard governs its rights to assert RICO claims on behalf of its members. Pet. at 8.

> to imply a cause of action . . . that is significantly broader than the remedy that Congress chose to provide.
>
> . . . Generalized references to the 'remedial purposes' of the 1934 Act will not justify reading a provision 'more broadly that its language and the statutory scheme reasonably permit.' "

Touche, Ross & Co. v. Redington, 442 U.S. 560, 574-578 (1979).

The only case authority cited by Plaintiff is a New Jersey decision interpreting the New Jersey Condominium Act, the terms of which authorize a Condominium Association to sue on behalf of its members. The Land Sales Act contains no such provision. The remedy which it does contain, however, requires individual proof and precludes associational standing in this case.

C. The Application of Warth and Hunt.

Plaintiff asserts that the Court of Appeals improperly applied *Warth* and *Hunt* because significant individual participation is not required to establish liability, and because "prospective equitable relief" can never require extensive individual proof. This contention simply ignores the rationale of the Court of Appeals' holding.

The Court of Appeals held that the "prospective equitable relief" authorized by the Land Sales Act necessarily requires individualized proof. App. at A-6-8. Plaintiff apparently believes that any prayer for prospective equitable relief automatically dispenses with the necessity for individual proof. Under this view, the sole inquiry is the label plaintiff attaches to his prayer for relief, rather than the nature of the proof required to obtain it.

Warth and *Hunt* are not susceptible to that type of mechanical application. Rather, both cases require a functional

analysis of the kind of proof required to grant the relief at issue. See, e.g., *Massachusetts Hospital Association, Inc. v. Harris*, 500 F. Supp. 1270, 1276 (D. Mass. 1980). Even in the context of a prohibitory injunction, this Court has rejected associational standing when individual proof was necessary to establish the propriety of that relief. *Harris v. McRae*, 448 U.S. 297, 329 (1980).

The "prospective equitable relief" sought here is specific performance under the Land Sales Act. A District Court could not possibly satisfy its duty to consider the statutory criteria for such relief without extensive individual participation. As a result, associational standing is wholly inappropriate.

CONCLUSION

For the foregoing reasons, Defendants Cross-Respondents respectfully pray that the Court deny the cross petition for certiorari.

Respectfully submitted,

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REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I. INTRODUCTION

Cross-Respondents (the Defendants in the District Court) assert two erroneous propositions in their Brief in Opposition to Cross-Petition for Writ of Certiorari ("Defendants' Br."):

1. That the Cross-Petition is premised on a decision by the court below that allows Cross-Petitioner, Terre Du Lac Association, Inc. (the "Association"), to assert the individual RICO claims of its members, and

2. That the Defendants did not, and (presumably) as a matter of law could not, petition the Court to review an

> aspect of the Court of Appeals' decision that is assertedly favorable to Defendants.

Defendants' Br. at 4.

The Association submits this reply brief to dispel any doubt concerning the basis for its Cross-Petition.

II. ARGUMENT

A. Defendants' Petition For Certiorari First Raised The Issue Of The Association's Standing To Sue Under RICO

The Association did not state or imply in the Cross-Petition that the Court of Appeals had addressed, much less resolved, the issue of the Association's standing to assert RICO claims on behalf of its members. To the contrary, the Cross-Petition clearly explains that the Court of Appeals never reached this issue. Instead, that court erroneously concluded that the Association did not contest the District Court's adverse ruling thereon. Cross-Petition at 6, n.2; *see* App. at A-9.

The Association refrained from petitioning for rehearing or for certiorari "to correct" this mistake. Defendants' Br. at 4. The conclusion of the Court of Appeals' opinion, which states: "We...reverse the dismissal of the RICO (count fifteen) and antitrust claims (count sixteen)...." (Cross-Petition, App. A at A-15), without limiting the reversal to the claim asserted by the Association in its own right made such a petition unnecessary.

The Defendants were not, however, content with the Court of Appeals' opinion. Their Petition for Certiorari in Docket No. 85-1169 frames the questions presented to encompass the entire issue of the Association's standing to sue under RICO. Presumably, Defendants so framed their Petition because they

sought a decision from this Court that addressed the Association's standing to pursue Count Fifteen of the Amended Complaint in its entirety, as did the Court of Appeals' order reversing the dismissal of that Count.

B. A Prevailing Party In The Lower Courts May Seek Review Of The Decision Favorable To Themselves Through A Petition For Certiorari

Now that they have reviewed the Cross-Petition, Defendants realize that their strategy creates a vehicle for review of the issue of associational standing to pursue the Interstate Land Sales claims, as well as the RICO claims. Defendants erroneously seek to avoid this consequence by claiming that they "could not" petition this Court to review the associational standing issue under RICO.

Defendants' Brief does not elaborate on the basis for this contention. It apparently stems from Defendants' present assertion that they prevailed on the issue of associational standing under RICO in the Court of Appeals, and their unsubstantiated assumption that a prevailing party cannot petition for certiorari. As explained above, it is not at all clear from the Court of Appeals' opinion that Defendants did prevail on the issue of associational standing under RICO. It is clear, moreover, that a prevailing party can seek certiorari.

The right to petition the Court for a writ of certiorari is defined by 28 U.S.C. § 1254, which states, in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) by writ of certiorari granted upon the petition of *any* party to any civil or criminal case, before or after rendition of judgment or decree....

28 U.S.C. § 1254 (emphasis supplied). The right to petition for a writ of certiorari is not limited to parties aggrieved by the outcome of a case in the court of appeals or the district court. The sole statutory limitation on standing to petition this Court for a writ of certiorari is that the petitioner be a party. *See, e.g., United States v. Bankers Trust Co.*, 294 U.S. 240, 243 (1935) (petition filed by prevailing party); *United States v. United Mine Workers,* 330 U.S. 258, 269 (1947) (petition filed by prevailing party); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 937 (1952) (petitions filed by prevailing and losing parties, both petitions granted); *United States v. Nixon,* 418 U.S. 683, 686-87 (1974) (petition filed by prevailing and losing parties, both granted). The fact, if it is one, that Defendants prevailed in the Court of Appeals on any aspect of the RICO claims does not preclude them from seeking review of those aspects of the Court of Appeals' decision on which they prevailed, in addition to those aspects on which they lost.

III. CONCLUSION

The Association's cross-petition for certiorari is premised upon the fact that Defendants themselves raised the broad issue of the Association's standing to sue under RICO. A necessary sub-issue within this broad standing question is whether the Association has standing to assert RICO claims not only on its own behalf, but also on behalf of its members. Since the basic principles governing such associational standing are identical regardless of the cause of action asserted, the Association has requested this Court to consider the propriety of such standing in this case under both RICO and the Interstate Land Sales Act.

While Defendants may now be unhappy with the consequences of the broad standing question which they chose to present for this Court's review, the fact remains that this issue can-

not be resolved completely in this case without also considering the narrower associational standing issue identified the cross-petition.

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